STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 25, 2005
v	No. 256493 Wayne Circuit Court
SCOTT BUTLER LESANE, Defendant-Appellant.	LC No. 04-001903-01

Before: Cavanagh, P.J., and Smolenski and Zahra, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions of second-degree murder, MCL 750.317, three counts of assault with intent to do great bodily harm less than murder, MCL 750.84, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. We affirm.

Defendant's convictions arise from a shooting incident in Detroit on July 4, 2003. The episode began when defendant encountered Howard Levar Smith outside a convenience store. The men exchanged angry looks, and Smith slapped a bottle out of defendant's hand. Defendant pulled a semiautomatic handgun from his pants and began shooting at Smith, who was standing in front of the door of the store. Smith was wounded in the knee and thigh. Defendant also wounded two customers in the store, Porsche Thomas and Dennis Nix. Another customer, Thomas Turner, was shot and killed.

Defendant argues that the district court erred in finding sufficient evidence of premeditation to bind him over for first-degree murder, MCL 750.316. "If a defendant is fairly convicted at trial, no appeal lies regarding whether the evidence at the preliminary examination was sufficient to warrant a bindover." *People v Wilson*, 469 Mich 1018; 677 NW2d 29 (2004), citing *People v Hall*, 435 Mich 599, 601-603; 460 NW2d 520 (1990), and *People v Yost*, 468 Mich 122, 124 n 2; 659 NW2d 604 (2003). Here, as discussed below, defendant was fairly convicted. Accordingly, defendant has failed to state a cognizable claim on appeal regarding the sufficiency of the evidence at the preliminary examination. See *Wilson*, *supra.* Furthermore, the jury acquitted defendant of first-degree murder and convicted him of the lesser included offense of second-degree murder. Our Supreme Court held in *People v Graves*, 458 Mich 476, 486-488; 581 NW2d 229 (1998), that where a defendant is improperly charged with a higher offense, but the jury properly convicts him of a lesser included offense, reversal is warranted only where there is persuasive indicia of jury compromise. Assuming, arguendo, that defendant was

improperly bound over for trial on a charge of first-degree murder, the error was harmless because defendant was fairly convicted of second-degree murder, with no indicia of jury compromise.

Defendant also contends that he was denied the effective assistance of counsel because his trial counsel failed to request an instruction on voluntary manslaughter. To establish ineffective assistance of counsel, a defendant must show (1) that the attorney's performance was objectively unreasonable in light of prevailing professional norms and (2) that, but for the attorney's error or errors, a different outcome reasonably would have resulted. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). A defendant must affirmatively demonstrate that counsel's performance was objectively unreasonable and so prejudicial as to deprive him of a fair trial. *People v Ortiz*, 249 Mich App 297, 311; 642 NW2d 417 (2001). A defendant claiming ineffective assistance of counsel must overcome the strong presumption that the attorney was exercising sound strategy. *People v Knapp*, 244 Mich App 361, 385; 624 NW2d 227 (2001).

Here, defense counsel was not deficient for failing to request a manslaughter instruction because the evidence did not permit a jury to convict defendant of manslaughter. A jury instruction on a lesser included offense is appropriate if all the elements of the lesser offense are included in the greater offense and if a rational view of the evidence supports the instruction. *People v Nickens*, 470 Mich 622, 626; 685 NW2d 657 (2004). The elements of manslaughter are included in the offense of murder. *People v Mendoza*, 468 Mich 527, 540-541; 664 NW2d 685 (2003). Consequently, when a defendant is charged with murder, an instruction for voluntary and involuntary manslaughter must be given upon request if supported by a rational view of the evidence. *Id*. at 541, 545.

Common-law voluntary manslaughter is an intentional killing "committed under the influence of passion or in heat of blood, produced by an adequate or reasonable provocation, and before a reasonable time has elapsed for the blood to cool and reason to resume its habitual control, and is the result of the temporary excitement, by which the control of reason was disturbed, rather than of any wickedness of heart or cruelty or recklessness of disposition." *Mendoza*, *supra* at 535. The provocation necessary to mitigate a homicide from murder to manslaughter is that which causes a defendant to act out of passion rather than reason. *People v Sullivan*, 231 Mich App 510, 518; 586 NW2d 578 (1998). The provocation must be that which would cause a *reasonable person* to lose control. *Id*. (emphasis in original).

Smith's act of slapping a bottle out of defendant's hands is not provocation sufficient to cause a reasonable person to lose control and react by repeatedly firing a gun. Consequently, a rational view of the evidence did not support a manslaughter instruction. See *Mendoza*, *supra* at 541. Because trial counsel is not required to advocate a meritless position, defense counsel did not err in failing to request the instruction. See *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). Furthermore, failure to request an instruction for a lesser included offense could constitute sound trial strategy. *People v Sardy*, 216 Mich App 111, 116; 549 NW2d 23 (1996).

Defendant also argues that he was denied his constitutional right to counsel at a critical stage of the trial because substitute counsel stood in for trial counsel when the trial court responded to the jury's request for repetition of the instructions.

The Sixth Amendment guarantees the accused in a criminal prosecution the right to the assistance of counsel for his defense and applies to the states through the Fourteenth Amendment. US Const, Am VI; *People v Crusoe*, 433 Mich 666, 684 n 27; 449 NW2d 641 (1989). The complete denial of counsel at a critical stage of a criminal proceeding is structural error requiring automatic reversal, even without the showing of actual prejudice. *United States v Cronic*, 466 US 648, 659; 104 S Ct 2039; 80 L Ed 2d 657 (1984); *People v Duncan*, 462 Mich 47, 51-52; 610 NW2d 551 (2000). In *People v Johnson*, 215 Mich App 658, 665-666; 547 NW2d 65 (1996), this Court held that the trial court violated the defendant's constitutional right to counsel by removing his original counsel and appointing substitute counsel without the defendant's consent. The Court further held that this constitutional error required a new trial, regardless of whether the defendant could show prejudice. *Id.*

Here, however, defendant consented to the substitution of counsel. Although he initially stated that he preferred to wait for his own attorney, he agreed to the substitution after the trial court explained that it was only going to read back some instructions. The record does not support defendant's claim that the trial court "extracted" a waiver by pressuring defendant to accept the substitution. On the contrary, the record discloses that the trial court repeatedly informed defendant that it would wait for his attorney if that was what he wanted. Accordingly, this case is factually distinguishable from *Johnson*. Additionally, in *Hudson v Jones*, 351 F3d 212, 216-218 (CA 6, 2003), the Sixth Circuit held that the verbatim repetition of jury instructions is not a critical stage of the proceedings, and that prejudice would not be presumed where defense counsel was not present when the trial court repeated the instructions. Here, defendant has not claimed that he was prejudiced by the repetition of the instructions. We therefore find no error.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Michael R. Smolenski
/s/ Brian K. Zahra